

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2007 JUN 25 PM 2:20

Office of the
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Department of Health and Human Resources TITLE NUMBER: 64

RULE TYPE: Legislative CITE AUTHORITY: §§16-1-4 and 16-6-2

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 17

TITLE OF RULE BEING AMENDED: Food Establishments

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 25, 2007 AT 12:00PM ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Ann A. Spaner, Director, Public Health Relations
Bureau for Public Health, WVDHHR
350 Capitol Street, Room 702
Charleston, West Virginia 25301

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

FOOD ESTABLISHMENTS

BRIEF SUMMARY OF PROPOSED RULE

The rule proposes to amend the Food Establishments rule. The current rule references the 1999 FDA Model Food Code, and the new rule references the 2005 FDA Model Food Code. This rule maintains a regulatory program that ensures protection of the State's food supply. The major changes are as follows:

1. Establishments that serve raw or partially cooked foods will be required to include a consumer advisory, warning of the potential dangers of these products.
2. The definition of "food establishments" is expanded to include facilities conducting educational cooking courses.
3. The definition of "person in charge" is included.
4. All references to the term "whole-muscle, intact beef" are included.
5. Preventing contamination from hand contact was changed to reference the Food Code, rather than being redefined in sections of the previous Rule.
6. The number of immediately uncorrectable critical violations necessary for the closure of a food establishment was decreased from five (5) to three (3).
7. References to implementation were modified to reflect the adoption of the updated 2005 FDA Model Food Code.

Economic Impact

The revised rule is not expected to have an adverse economic impact.

Jobs impact

The revised rule is not expected to have an adverse impact on jobs in the regulated industry.

Environmental Impact

The revised rule will not affect the environment.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: _____

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) DHHR BPH - Office of
Environmental Health Services
1 Davis Square, Suite 200
Charleston WV 25301-1798

LEGISLATIVE RULE TITLE: 64CSR17 Food Establishments _____

1. Authorizing statute(s) citation WV Code 16-1-4 and 16-6-2 _____

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) *or* Public Comment Period ended:

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Linda Whaley, R.S. Food Program Manager/Training Officer, WV Bureau for
Public Health, 1 Davis Square; Suite 200
Capitol and Washington Streets
Charleston, WV 25301
(304) 558-6727
Fax: (304) 558-1071
e-mail: lindawhaley@wvdhhr.org

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 64CSR17 - Food Establishments

Type of Rule: x Legislative Interpretive Procedural

Agency: Health and Human Resources

Address: Building 3, Room 206
Capitol Complex
Charleston, West Virginia 25305

Phone Number: (304) 558-2971 Email: annspaner@wvdhhr.org

Fiscal Note Summary

Summarize in a clear and concise manner what effect this measure will have on costs and revenues of state government.

This Rule repeals and replaces an existing Rule and updates references to Federal regulations. There will be no additional revenues generated from the adoption of this Rule. Costs to implement this rule revision will be for training of staff and printing inspection report forms and educational materials.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

Effect of Proposal	Fiscal Year		
	2008 Increase/Decrease (use "-")	2009 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	11,700	11,700
Personal Services		4,400	4,400
Current Expenses		7,300	7,300
Repairs and Alterations			
Equipment			
Other			
2. Estimated Total Revenues			

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

These expenses include providing training to local and state health department sanitarians on the changes in the 2005 Food Code and the cost of printing updated inspection and reference materials.

Training will be held at five locations around the state (one at the central office, incurring no additional cost for meeting room or staff accommodations). Two personnel will conduct the training. Personnel expenses for this training is estimated at \$4,400. Travel expenses for these personnel are estimated at \$1,200. Vehicle expenses for this travel is estimated at \$600. Hospitality (to include room rental) is estimated at \$2,000.

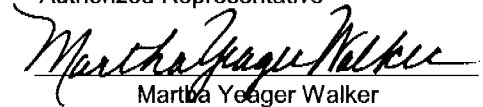
Printing expenses are estimated at \$3,500. This includes 20,000 inspection report forms for use by local and state sanitarians and 13,000 code reference packets to be distributed to permitted facilities.

Memorandum

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date

Agency
Department of Health and Human Resources

Authorized Representative

Martha Yeager Walker
Secretary

TITLE 64
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BUREAU FOR PUBLIC HEALTH

JUN 25 PM 2:21

SERIES 17
FOOD ESTABLISHMENTS

OFFICE OF THE
SECRETARY OF STATE

§64-17-1. General.

1.1. Scope. -- This legislative rule establishes the minimum requirements for the design, construction, management and operation of food establishments.

1.2. Authority. -- West Virginia Code §§16-1-4 and 16-6-2.

1.3. Filing Date. -- .

1.4. Effective Date. -- .

1.5. Repeal and Replacement of Former Rules. -- This legislative rule repeals and replaces Division of Health rule, Food Establishments, 64CSR17, filed April 14, 2000, and effective July 1, 2000.

1.6. Applicability. -- This rule applies to the owners and operators of food establishments.

1.7. Enforcement. -- This rule is enforced by the commissioner of the Bureau for Public Health.

§64-17-2. Definitions.

2.1. Commissioner. -- Commissioner of the Bureau for Public Health or his or her designee.

2.2. Family day care facility. -- A child care center which is used to provide

nonresidential child care for seven to twelve children, including children who are living in the household who are less than six years of age.

2.3. Family day care home. -- A facility which is used to provide nonresidential child care for less than seven children, including children who are living in the household who are less than six years of age.

§64-17-3. Incorporation By Reference of Federal Model Food Code.

3.1. The Federal Food Code, also known as the 2005 Recommendations of the United States Public Health Service, Food and Drug Administration, hereinafter referred to as the Food Code, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration, is incorporated by reference with the following exceptions:

3.1.a. In Chapter 1, the definition of food establishment in paragraph 1-201.10(B) shall not be used for the purposes of this rule. In lieu thereof, the term "food establishment" shall be defined as in section 4 of this rule;

3.1.b. In Chapter 3, 3-501.16(A)(2)(b) and subparagraph 3-501.17(A)(2) shall be not apply;

3.1.c. In Chapter 3, paragraph 3-501.16(B) shall not be used for purposes of this rule. The following shall apply: "Eggs that have not been treated to destroy all viable Salmonellae shall be stored in refrigerated equipment that maintains an ambient air temperature of five degrees Celsius or forty-one degrees Fahrenheit, or less.";

3.1.d. In Chapter 3, paragraph 3-603.11(A) shall not apply;

3.1.e. In Chapter 3, subparagraph 3-603.11(C)(3) the following shall apply: "Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase the risk of foodborne illness, especially for children, elderly, immunocompromised individuals and persons with certain medical conditions.";

3.1.f. In Chapter 8 section 8-102.10, section 8-304.10, and paragraph 8-304.11(II) shall not apply.

3.1.g. In Chapter 8, section 8-201.11 shall include the following sentence after subsection C: "All required plans shall be submitted at least forty-five days prior to the start of construction, conversion, or remodeling.";

3.1.h. In Chapter 8, part 8-6, and subparts 8-805 through 8-813 of Annex 1 shall not apply.

3.1.i. In Annex 1, section 8-804.10, shall include the following additional provision:

"The commissioner may also summarily suspend a permit to operate a food establishment if:

1. The food establishment has three or more immediately uncorrectable critical items in violation at the time of inspection; or

2. The permit holder has been determined by the commissioner to have obstructed or hindered the commissioner in the proper discharge of his or her duties; and

3. Enforcement shall be in accordance with West Virginia Code §16-1-1, et seq. and §16-6-1, et seq."

3.2. The commissioner shall use Annexes 2 through 7 of the Food Code in the interpretation and application of this rule.

3.3. The Food Code is available on the internet at: <http://vm.cfsan.fda.gov/~dms/foodcode.html>, or as posted by the United States Food and Drug Administration.

§64-17-4. West Virginia definition of food establishment.

4.1. Food Establishment. -- The following entities are considered to be "food establishments" in West Virginia for the purpose of compliance with this rule:

4.1.a. An operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption.

4.1.b. A restaurant; satellite or catered feeding location; catering operation, if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank;

4.1.c. An entity that relinquishes possession of food to a consumer directly or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers;

4.1.d. All elements of an operation, such as transportation vehicles or central preparation facilities, that supply a vending location or satellite feeding location, unless the vending or feeding location obtains a permit to operate in accordance with part 8-3 of the Food Code;

4.1.e. An operation that is conducted in a mobile, stationary, temporary or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food;

4.1.f. Facilities that offer cooking demonstrations or instruction, with or without student participation.

4.2. Food establishments shall not include:

4.2.a. An establishment that offers only prepackaged foods that are not potentially hazardous and does not provide reusable tableware to the consumer;

4.2.b. A produce stand that only offers whole, uncut fresh fruits and vegetables;

4.2.c. A food processing plant;

4.2.d. A kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable

organization's bake sale and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the commissioner;

4.2.e. An area where food that is prepared as specified in paragraph 4.2.d. of this subdivision is sold or offered for human consumption;

4.2.f. A kitchen in a family day care home; or

4.2.g. A private home that receives catered or home-delivered food.

§64-17-5. Modified requirements for specific types of food establishments.

5.1. A domestic-type kitchen with residential-style equipment is acceptable in the following types of food establishments:

5.1.a. A family day care facility;

5.1.b. A boarding house or a residential care facility, such as a personal care home, a residential board and care facility, a group home, a halfway house, or a work release center, with a maximum capacity of twelve occupants; and

5.1.c. A bed and breakfast inn that provides sleeping accommodations of six or fewer rooms, or that provides sleeping accommodations of more than six rooms if the entire inn or those rooms numbering above six are used on an aggregate of two weeks or less per year.

5.2. The food establishments identified in subdivisions 5.1.a., 5.1.b., and 5.1.c. of this section shall provide a sink in the

kitchen with at least two compartments. Any mechanical warewashing machine utilized shall be capable of sanitizing. A separate lavatory located in the kitchen for hand washing is not required.

§64-17-6. Implementation.

6.1. Food establishments in operation at the time this rule becomes effective, and meeting all prior applicable rules, are considered eligible for a permit to operate provided that any construction done after the effective date of this rule is in compliance with this rule.

6.2. New or extensively remodeled food establishments whose plans and specifications received written approval from the commissioner prior to the effective date of this rule are eligible for a permit to operate provided that the construction or remodeling is in compliance with the approved plans.

6.3. Upon implementing this rule, the commissioner shall provide training for local health department personnel.

§64-17-7. Food Establishment Advisory Board.

7.1. The commissioner shall maintain an advisory board and shall serve as chairman.

7.2. The advisory board members shall include, but are not limited to, representatives of the Bureau for Public Health, local health departments, the retail food industry, restaurants, institutional food service providers, senior programs, convenience stores and school lunch programs.

7.3. The duties of the board shall

include, but are not limited to, developing recommendations on:

7.3.a. Training;

7.3.b. Standardization of local health department personnel and programs;

7.3.c. Interpretations of the provisions of this rule;

7.3.d. Requests for waivers and variances;

7.3.e. Responding to complaints; and

7.3.f. Revisions of the rule, including bare-hand contact with ready-to-eat foods.

7.4. The board shall use Annexes 2 through 7 of the Food Code as guidelines in the performance of its duties.

§64-17-8. Fees.

All the fees established in the Bureau for Public Health rule, "Fees for Permits", 64CSR30, for a food service establishment, mobile food unit, a temporary food establishment, a retail food store and a vending machine and others shall be applicable to establishments governed by this rule.

§64-17-9. Hearings and Administrative Due Process.

9.1. A permit applicant, a permit holder, an employee or other person may petition the Commissioner in writing, as prescribed in the rule, "Rules of Procedure for Contested Case Hearings and Declaratory Rulings", 64CSR1, for a contested case

hearing when the commissioner has:

9.1.a. Denied their application for a permit to operate;

9.1.b. Suspended or revoked their permit to operate;

9.1.c. Denied their request for a variance;

9.1.d. Issued a hold order;

9.1.e. Issued an employee restriction or exclusion order; or

9.1.f. Otherwise adversely affected their rights, duties, interests or privileges of the petitioner.

9.2. Within ten days after receipt of the written petition, the commissioner shall

grant or deny a hearing on the matter in accordance with the rule, Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64CSR1.

9.3. The filing of a petition for a hearing shall not stay or suspend the execution of the notice or order issued by the commissioner.

§64-17-10. Penalty for Violating Provisions of Rule.

10.1. Violation of the provisions of this rule is a misdemeanor. The commissioner may take enforcement actions for violation in accordance with West Virginia Code §§16-1-18, 16-6-23 and 16-6-24.